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In the Supreme Court of the United States

OCTOBER TERM, 1975

IN THE MATTER OF

SAMUEL V. BOSSOV,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Samuel V. Bossov, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois which suspended him from the practice of law for three (3) years.

OPINION BELOW

The judgment of the Supreme Court of Illinois, two justices dissenting, was entered March 24, 1975. The unreported opinion is reprinted at Appendix A. Petition for Rehearing was denied May 29, 1975. A copy of the order denying rehearing is reprinted at Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the suspension of an attorney in a state court disciplinary proceeding on stale charges, based on events of 14 to 17 years ago, is commensurate with the "due process," "speedy trial" and "cruel and unusual punishment" provisions of the United States Constitution as applied to the states through the Fourteenth Amendment.

2. Whether the state court violated the constitutional standard of due process when it shifted the burden of proof on essential elements of the charges against the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This was a disciplinary proceeding instituted on February 5, 1965, against a duly licensed attorney at law, Samuel V. Bossov.

A 16 count complaint was lodged against Mr. Bossov (the instant Petitioner) by the Board of Managers of The Chicago Bar Association, sitting as commissioners of the Supreme Court of Illinois. The complaint alleged that between May, 1957 and February, 1961, Petitioner had unlawfully solicited and procured personal injury cases and failed to account to clients for monies received on their behalf.

The charges against Petitioner were the outgrowth of an investigation by the American Insurance Association, whose employees and agents posed as representatives of The Chicago Bar Association. As the dissenting opinion below notes, the investigation lasted several months and witnesses were "ferreted out" by a "multitude of insurance investigators." None of Petitioner's clients were

among the "complainants" in the 16 charges filed against him.[1]

Of the original 16 count complaint, seven entire counts were abandoned. Solicitation charges in five of the nine remaining counts were retained; "failure properly to account" was charged in 14 of the original 16 counts of which five were retained; and the charge of "failure to consult with clients on settlements" was retained in three counts. In the counts which survived dismissal, unprofessional conduct was charged in eight accident cases—the most recent of which occurred on February 10, 1961, and the oldest of which happened on July 12, 1958.

The Bar Association's complaint was served upon the attorney on February 5, 1965—four years after the most recent accident, four years and eight months after the most recent allegation of failure to account, and three

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[1] In 1965 the standard procedure in initiating and conducting an investigation of an attorney for disciplinary purposes was by an inquiry or grievance committee of The Chicago Bar Association, or the Illinois State Bar Association. If the evidence heard by these committees warranted discipline, a formal complaint was made against the attorney, hearings thereon were held by the Bar Association committees involved and recommendations made by the governing officials of the Bar Association to the Supreme Court of Illinois for appropriate discipline. In 1973 this procedure was changed by a rule of the Supreme Court establishing the Attorney Registration and Disciplinary Commission, a full-time body with subpoena power, to conduct its own investigations of complaints against attorneys and to recommend appropriate discipline to the Supreme Court. Ill.Rev.Stat. ch. 110A, §§ 751-756 (1973); see, Murphy, *Disciplinary Procedures*, 60 Ill. Bar J. 528 (1972). The instant procedure of commencing and processing a complaint against Petitioner by agents and employees of a self-interested body such as the American Insurance Association was most unusual.

years and five months after the Insurance Association investigation was completed. Proofs were closed November 12, 1970.

Without explanation, the hearing panel of the Chicago Bar Association delayed for over two years and seven months before issuing a report on June 14, 1973, recommending disbarment of Petitioner. This recommendation was not adopted and on January 7, 1974, the Board of Managers filed a report with the Illinois Supreme Court recommending suspension for three years. Four justices of the Supreme Court of Illinois accepted the sanction recommended by the Board of Managers and entered judgment accordingly. Two justices dissented on the ground, in part, that the punishment was excessive in the circumstances.

In the interval between February 10, 1961, the date of the last alleged misconduct of the Petitioner, to the present, no fresh charges were made against him and he continued to practice law in a responsible and proper professional manner.

Petitioner specifically raised the constitutional issues underlying this Petition for Writ of Certiorari before the Illinois Supreme Court. Petitioner asserted that unreasonable delays in the disciplinary proceedings violated his constitutional right to due process of law. (Brief of Respondent at 6-7, 47-57; Petition for Rehearing, 13-15, 18-25).

The Illinois Supreme Court "deplored" these delays and commented there was "no explanation" for the delay of over two years between the completion of hearings and the filing of the report. Nevertheless the majority held

that ". . . on this record they do not constitute a sufficient ground for the dismissal of the complaint." (App. A at 8).

Despite Petitioner's allegations of specific prejudice caused by delay and the demonstrated inability of witnesses to remember the events, the court found that there was "no charge of specific prejudice made" and that the record indicated "no prejudice" resulted from the delays. (App. A at 9).

Likewise, the majority rejected Petitioner's assertion that the charges had not been established by clear and convincing evidence on a record free from doubt. (App. A. at 2).

REASONS FOR GRANTING WRIT

It is respectfully submitted that the instant record presents serious constitutional violations worthy of this Court's review as follows:

(1) The long delay in filing charges and the additional delay in imposing sanctions violated Petitioner's right to due process.

(2) The punishment was "cruel and unusual."

(3) The court below failed to meet due process standards of proof in determining Petitioner's guilt.

I.

PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS ABRIDGED BY THE INSTANT DISCIPLINARY PROCEEDING.

A disciplinary proceeding against an attorney is quasi-criminal in nature and the basic constitutional requirements of due process apply. *In re Ruffalo,* 390 U.S. 544, 551 (1968); *Spevack* v. *Klein,* 385 U.S. 511 (1967).

A. The Delays In Processing Stale Charges Were Prejudicial And Unjust To Petitioner.

The delays of the Chicago Bar Association in initiating the action and in rendering its report and recommendation of punishment are without explanation or justification. Although Illinois law specifies no statute of limitations for disciplinary proceedings, most jurisdictions consider lengthy delays as cause for dismissal of charges. See *Tennessee Bar Association* v. *Berke,* 344 S.W.2d 567 (C.A. Tenn. 1960); *Florida Bar Association* v. *Randolph,* 238 So.2d 635, 639 (Fla. 1970). It is also the law of Illinois.

People v. *Allison*, 68 Ill. 151 (1873); *People* v. *Hooper*, 218 Ill. 313, 75 N.E. 896 (1905).

In the *Tennessee* case, the court remarked in language pertinent to the instant case:

> "The gravity of the charges demanded that they be examined fully at the first opportunity. That this was not done does not appear to be the fault of Berke. . . . Moreover, it appears that in the nine-year period, Berke has not transgressed against the ethics or morals of the legal profession, but to the contrary, sustained a good reputation as a lawyer." 344 S.W.2d at 572.

In the *Florida* case the court remarked:

> "The responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard, the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so, even though the record shows that the conduct of the lawyer merits discipline." 238 So.2d at 639.

The majority of the Illinois Supreme Court unrealistically and inaccurately suggests that no prejudice was shown as a result of the delay in the proceedings against Petitioner. (App. A at 9). The record, however, is replete with instances where Petitioner was prejudiced in his defense by the confused and uncertain testimony of witnesses who freely admitted to greatly diminished powers of recollection. The Bar Association's unreasonable delay in filing charges after completion of a full investigation was in large part responsible for the losses of recollection.

Petitioner was particularly prejudiced by this delay in defending allegations that he solicited personal injury claims. In four instances, the witnesses testified that un-

identified persons recommended Petitioner as their attorney. But the complaint against Petitioner alleged that he ". . . retained and employed various persons to solicit and/or procure, *for consideration*, personal injury claims." (Emphasis added). The witnesses were unable to identify any so-called procurers.[2] Where a principal party to the event in question cannot be located because of delay, the defense has been substantially prejudiced. *United States* v. *Curry*, 284 F.Supp. 458 (N.D. Ill. 1968). These understandable losses of memory, caused by delays from five to nine years between the alleged event and the time of testimony, prejudiced the Petitioner in refuting the allegations against him. For example, Petitioner was unable to establish by independent testimony the negative fact, consistent with his own testimony, that he never paid anyone to solicit personal injury claims.

One witness described the effect of the delays on his ability to testify as follows:

> "After seven years I couldn't tell you much of anything." (R. 1163).

The Illinois Supreme Court conceded that most of the evidence concerning solicitation was circumstantial. (App. A at 4). The only evidence of solicitation that was not circumstantial involved a lady of advanced years who testified nine years after the event that Petitioner personally solicited her son's injury claim. In the interim, she had suffered a stroke and admitted that her mind was "not as great as it was." (R. 1065). Her physical description

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[2] One witness, testifying 7 years after the event, claimed that one of Petitioner's lawyers in this case and an investigator solicited his case in Chicago in 1960. It was stipulated that the lawyer was then a student in Cambridge, Massachusetts, and the investigator testified he first met the witness in 1965 in the course of preparing for Petitioner's disciplinary hearing.

of Petitioner was completely inaccurate (R. 1110) and she testified that the man who approached her on a Saturday in the summer of 1958 wore a hat. (R. 1067). Petitioner's habit was to play golf every summer weekend and never (except on one occasion when he lost a bet) to wear a hat. (R. 1969-70).

Contrary to the majority's assertion that "[t]here is no prejudice to the respondent shown by the record [of delay] here . . ." (App. A at 9), the record clearly shows prejudice in that Petitioner was unable to examine the alleged "procurers" in order to refute the inference that four isolated recommendations of his services ". . . show[ed] a pattern of comprehensive solicitation and procurement . . . ." (App. A at 2). Procedural due process required nothing less than prompt and fair notice of the charges in this disbarment proceeding. See, *In re Ruffalo,* 390 U.S. 544, 551, n.4 (1968).

B. The Sanction Imposed On The Petitioner Is "Cruel And Unusual" In The Circumstances Of The Instant Record.

A punishment which is "greatly disproportionate to the offense charged" is repugnant to the Eighth Amendment, *Weems* v. *United States,* 217 U.S. 349, 371, 382 (1910), the substance of which is now firmly embodied in the Fourteenth Amendment. *Robinson* v. *California,* 370 U.S. 660 (1962).

The discipline of an attorney whether by disbarment or prolonged suspension ". . . is the destruction [of the attorney's] professional life, his character and his livelihood. A removal of an attorney from practice for a period of years entails the complete loss of clientele with its consequent uphill road of patient waiting once again to estab-

lish himself in the eyes of the public, and the good graces of the courts and his fellow lawyers. In the meantime, his income and livelihood have ceased to exist." *In re Donaghy,* 402 Ill. 120, 83 N.E.2d 560, 562 (1948). While a punishment as severe as a three-year suspension may have been suitable at the time of the infractions, the intervening fourteen-year period has seen the marriage of the Petitioner, the raising of three children, and the conduct of a respectable law practice, unmarred by even a suggestion of impropriety.

Moreover, this Court has recognized that inordinate delay—

> "May 'seriously interfere with defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.' " *Moore* v. *Arizona,* 414 U.S. 25, 27 (1973).

In light of the punishment that Petitioner has been suffering for the last decade and his exemplary record for the last fourteen years, a three-year suspension is indeed "greatly disproportionate to the offense(s) charged."

As this Court has said:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson* v. *California,* 370 U.S. 660, 667 (1962).

The dissenting opinion of the Illinois Supreme Court is absolutely correct in asserting that, even accepting the majority's view of the evidence, the punishment of three years' suspension is harsh and excessive.

II.

PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE FAILURE OF THE ILLINOIS SUPREME COURT TO APPLY THE REQUIRED STANDARD OF PROOF.

Due process at the bare minimum requires that an accused can only be found guilty of the charges set out in the complaint. The Petitioner was charged, in part, with soliciting clients through paid agents. A failure to allege that the agents were hired by Petitioner would have been fatally defective under settled Illinois law. *In re Donaghy*, 402 Ill. 120, 83 N.E.2d 560 (1948).

The only evidence offered to support this charge consisted of testimony by former clients that certain unidentified individuals had recommended Petitioner as a lawyer. There was no evidence to support the essential allegation that the solicitors were paid for their efforts. The Illinois Court, however, held that such payments would be presumed from the evidence that unidentified individuals had recommended Petitioner. The court stressed that the Petitioner had failed to prove the absence of payment.[3]

Petitioner was thus charged with misconduct consisting of two elements—solicitation and payment. After the evidence had been gathered and the hearings closed, however, he was informed that the Complainant need only show

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[3] In its decision the Illinois Supreme Court stated:

"We consider the evidence of solicitation satisfied the requirement that it be clear and convincing. The respondent's argument that there was no evidence that the respondent had employed anyone to solicit injury claims for him or that he had paid anyone to do so does not persuade. We consider that the evidence of solicitation, though mostly circumstantial, was convincing." (App. A at 3-4).

solicitation. Petitioner must then disprove the second element, even though no evidence of its existence had been introduced and despite the fact that the alleged solicitors were never identified.

Such changes in the rules in the late stages of a disciplinary proceeding offend due process by denying Petitioner fair notice of the burden being imposed upon him. In *In re Ruffalo*, 390 U.S. 544 (1968), an attorney was charged with hiring a specified individual to solicit clients. In the middle of the hearings, the attorney's evidence demonstrated that this individual was hired as an investigator and not a solicitor. The charges were then amended to allege that the investigator was hired to investigate his own employer. This Court held that such procedure violated the attorney's due process rights. The fact that the attorney was given an opportunity to present evidence on the amended charges did not cure the constitutional defect since the attorney's actions during the earlier stage of the hearings were prejudiced by the amendment. The present case presents similar, although more egregious, constitutional violations. The charges against Petitioner were effectively amended to dispense with the allegation of payment only after the hearings had been completed. Unlike the attorney in *Ruffalo*, Petitioner had no opportunity to present further evidence when he discovered that the burden of proving the absence of payment had been placed upon him.

As noted above, Illinois law requires proof of attorney misconduct by clear and convincing evidence on a record free from doubt. *In re Moore*, 8 Ill.2d 373, 134 N.E.2d 324, 327 (1956). The Illinois court failed to apply this standard and shifted the burden of proof on an essential element of the charges. Relaxation of the customary standard of proof in such proceedings violates the due process clause.

In re Winship, 397 U.S. 358 (1970). See also, *Mullaney* v. *Wilbur*, 95 S.Ct. 1881 (1975); *Cool* v. *United States*, 409 U.S. 100 (1972).[4]

CONCLUSION

For these reasons Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

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[4] Disciplinary actions against attornies are for due process purposes, equivalent to juvenile proceedings. See *In re Ruffalo*, 390 U.S. 544, 551 (1968). This Court held in *Winship* that a shift in the standards of proof in juvenile proceedings violates due process requirements.